quired. (*Glasser* v. *United States*, 315 U.S. 60 [1942]) The court further failed to consider the questionable constitutionality of this exception to the hearsay rule, (*Evans* v. *Dutton*, 400 F. 2d 826 [1968]) a matter of substantial national importance at this time since this court has noted probable jurisdiction for certiorari in *Evans*, supra.

In light of the unique interrelationship of the admission of hearsay testimony to the denial of a continuance to obtain the presence of the absent material defense witness whose out-of-court declarations constituted this hearsay and in light of the total dependence of the prosecution on hearsay testimony and the questionable validity of the co-conspirator hearsay exception, this court should now consider and rule upon the propriety of the use of hearsay in this case and upon the constitutionality of this exception.

II

Significantly, respondent admits the error of the United States Court of Appeals for the Ninth Circuit in mistakenly stating that the absent material witness, Jesse H. Coy, was free on bail and thus implying economic compulsion to return to court at the specified date. This admitted error is most significant to the Court of Appeals' holding that there was no abuse of discretion in the trial court's denial of a continuance to obtain the presence of said absent material defense witness. The fact that the witness was under no economic compulsion to appear at the trial is particularly

relevant in light of the conduct of the prosecution in failing to maintain contact with the absent witness although directed to do so by the trial court and thereafter opposing the motion for the continuance when the witness failed to appear. This error clearly tended to minimize consideration of the prosecution's affirmative role in failing to produce its employee, Jesse H. Coy, as reasonably expected by petitioner. After the defense had been forced to cause his arrest as a material witness following Coy's refusal to accept a subpoena, the absent witness was freed on his own recognizance and, notwithstanding the restrictive provisions of 18 USC §3149 and §3150, no precautions whatsoever were taken to assure the presence at trial of this absent material defense witness, although the trial judge specifically instructed him to remain ready to testify at the continued trial date and instructed the United States Attorney to maintain contact and provide the witness with the trial date. In addition to the foregoing, the processes to compel the attendance of the absent witness were totally within the exclusive control of the prosecution. The attention of the Court of Appeals was clearly diverted from the consideration of the cumulative effect of these events by its erroneous statement of the facts. Because of the impropriety of the prosecution's use of hearsay testimony, occasioned by its own negligence, and the trial court's unfortunate denial of a continuance, which denied to the petitioner his only opportunity to confront this accuser, which was overlooked by the Court

of Appeals because of its misstatement of the facts, this court should grant this petition for mandamus and order further review.

III

The respondent, in its memorandum in opposition, suggests that the grossly prejudicial effect to petitioner of the denial of a continuance to obtain the presence of the absent material defense witness, whose testimony was so basic to petitioner's defense below, was mitigated by permitting the introduction of a tape recorded statement of said absent material defense witness. This argument fails to consider the unresponsive nature of prior tape recordings and the true nature of the right of confrontation contained within the Sixth Amendment, which includes the right to cross-examine and to present demeanor evidence. (*Bruton* v. *United States*, supra; *Barber* v. *Page*, supra)

For the foregoing reasons, it is respectfully urged that this court grant mandamus or certiorari and for further review in this matter.

Respectfully submitted,

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MURRAY B. PETERSEN, ESQ.
Co-counsel for Petitioner

PROOF OF SERVICE

I, Murray B. Petersen, co-counsel for petitioner in this Petition for Mandamus and/or Certiorari and counsel of record for petitioner in the United States Court of Appeals for the Ninth Circuit, and a member of the Bar of the Supreme Court of the State of California and of the United States Court of Appeals for the Ninth Circuit, hereby certify that I served two copies of the foregoing "Reply Memorandum in support of the granting of the petition for a Writ of Mandamus and the petition for a Writ of Certiorari" on each of the following named individuals by depositing the same in a United States mail box, with first class postage prepaid, this 2nd day of October, 1970, at Oakland, California, addressed as follows:

HON. ERWIN GRISWOLD
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

HON. OLIVER D. HAMLIN, JR.
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

HON. JAMES R. BROWNING
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

HON. HARRY PREGERSON
United States District Judge, Central District of California (sitting by designation), by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

JUDGES AND OFFICERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, by mailing 10 copies addressed to William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

JAMES L. BROWNING
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San Francisco, California 94102

MURRAY B. PETERSEN
Co-Counsel for Petitioner,
WINSTON BRYANT MCCONNEY

Subscribed and sworn to before me a Notary Public in and for the State of California, County of Alameda, this 2nd day of October, 1970.

C. JEAN JEFFRIES

Supreme Court
OF THE
United States
OCTOBER TERM, 1970
Nos. 5317 Misc. and No. 201

Supreme Court, U.S.
FILED
NOV 20 1970
E. ROBERT SEAVER, CLERK

WINSTON BRYANT MCCONNEY,
Petitioner,
vs.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON,
Respondents.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WINSTON BRYANT MCCONNEY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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IN THE

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United States

OCTOBER TERM, 1970

No. 5317, Misc.

WINSTON BRYANT MCCONNEY, *Petitioner*,

vs.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON, (Sitting by Designation), *Respondents*.

No. 201

WINSTON BRYANT MCCONNEY, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING

The petitioner herein respectfully moves this court for an order (1) vacating its denial of the petitions for writs of mandamus and/or certiorari entered October 12, 1970, and (2) granting the petitions